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court of appeals and
tax court

ERIC C. BOHNET
Indianapolis, Indiana

RICK LIKES d/b/a LIKES LOGGING and,
ADAM CUREY

VS.

JEFFREY G. SHANER and
CATHY SUTTON

Appellees.

March 16, 2009

FRIEDLANDER, Judge

Rick Likes d/b/a Likes Logging (Likes) and Adam Curey appeal from a small claims judgment in favor of Cathy Sutton on her counterclaim seeking treble damages for criminal conversion. On appeal, Likes and Curey present the following consolidated and restated question for review: Did the trial court err when it determined that Likes and Curey criminally converted Sutton's timber?

We reverse.

Sutton and Jeffrey Shaner jointly own real property in Steuben County as tenants in common, with each owning an undivided one-half interest.¹ On Thursday, October 4, 2007, Shaner contacted Likes, a friend of a friend, to discuss having him cut and remove some trees from the property. Though not involved in any discussions with Likes, Sutton was aware that Shaner was attempting to sell some timber off the property.

Likes met Shaner the next day, Friday, to walk the property line together and mark trees. Curey met Likes at the property later that evening to scale the marked trees and compute an offer price. Likes relayed the offer price to Shaner, which Shaner called to accept Saturday morning. Curey and Likes then went out to the property to meet with Shaner. While sitting at a table just outside of the home on the property, Likes and Shaner executed a timber purchasing contract. Pursuant to the contract, Shaner received a check for \$2544.00 in exchange for Likes being allowed to timber walnut, oak, and ash trees on the property. Likes informed Shaner that he would be out on Monday (October 8) to start removing the trees.

¹ While the nature of Sutton and Shaner's relationship is not clear, it appears from the record that they lived together on said property.

Immediately following the meeting, Shaner went inside the home and showed Sutton the contract and the check. Sutton expressed displeasure with the fact that the number of trees to be removed was not indicated in the contract. At no time, however, did she personally contact Likes to request an inventory list or to indicate her opposition to the contract, which was executed by Shaner. Rather, she simply spoke with Shaner about the matter over the weekend, and on Monday morning, she told Likes, “if they’re comin’ out here they better have a inventory list of what they’re taking, how many trees or whatever, before I sign anything.” *Transcript* at 96.

After Shaner signed the contract and before cutting any trees, Likes learned from a routine on-line check of the county land records that Sutton was listed as a co-owner of the property. Likes did not believe that he needed to have Sutton sign the contract, however, because Shaner had signed the contract and he figured Shaner was acting as “the man of the house.”² *Id.* at 54. Though the testimony is conflicting, Shaner testified that he called Likes on Monday morning of the scheduled cutting and told him there was “a question between me and the other owner about the contract and stuff, and how many trees he was gonna take out”. *Id.* at 73. According to Shaner, Likes informed him that he had a list that he would give to Shaner.

Later that morning, Likes and his crew cut down a number of trees on the property and skidded them into the field.³ Likes informed Shaner that they would return on Tuesday to

² In fact, Sutton testified that she had been ill for some time and, therefore, “[Shaner’s] been handlin’ things.” *Id.* at 105.

³ Sutton was inside the home while the cutting occurred.

haul the timber away. On Tuesday, Shaner called Likes and told him not to come back because the deal was off. Likes complied and did not return to remove the timber. When Shaner spoke with Likes the following Sunday, October 14, Shaner indicated that he did not think he had received a fair price and that Likes had cut too many trees, including at least one maple tree. Curey called Shaner about two days later to inquire further about the situation. Shaner indicated he had learned from a friend that the timber was worth substantially more than he had been paid. Shaner never cashed the check that he received from Likes, and Likes eventually made a stop-payment request upon the check in January 2008.

On October 18, 2007, Likes initiated a small claims action against Shaner in Steuben County Superior Court seeking damages for breach of contract. Thereafter, Sutton intervened in the action, and Sutton and Shaner filed a counterclaim against Likes and Curey alleging the men had committed criminal conversion by cutting down the trees without consent. Sutton and Shaner sought treble damages and attorney's fees pursuant to Ind. Code Ann. § 34-24-3-1 (West, PREMISE through 2008 2nd Regular Sess.), which permits victims of certain crimes to bring a civil action for treble damages and attorney's fees.

A bench trial was held on July 2, 2008. All parties agreed at trial that the timber, which remained laying in the field, had lost all its value except for use as firewood. On July 10, the court issued its findings of fact and judgment. The court found that Shaner breached his contract with Likes and awarded damages in the amount of \$2000 in lost profits to Likes. With respect to the counterclaim filed by Sutton and Shaner, the court found as follows:

6. Cathy Sutton owns a one-half (1/2) undivided interest in the real estate from which the timber was harvested. Rick Likes and Adam Curey

knew that Cathy Sutton owned this interest in the real estate. They however, without her authority or consent, entered upon the real estate and harvested timber.

7. The harvested timber had a value of at least \$4,544.00 at the time of its harvest. The timber has no current value, save salvage value. Her one-half undivided interest in the timber is therefore \$2,272.00.

8. Rick Likes and Adam Curey exert [sic] unauthorized control over the property of Cathy Sutton. They violated Indiana Code 35-43-4-3.

9. Pursuant to Indiana Code 34-4-30-1 [sic], Cathy Sutton may collect up to three time [sic] her actual damages and attorney fees from Rick Likes and Adam Curey. Considering the treble damages alone, Cathy Sutton is entitled to judgment of at least \$6,816.00. She is also entitled to attorney fees. The Court finds that a reasonable attorney fee for this cause to be \$750.00.

10. The Court is limited by statute to judgments of \$6,000.00 or less. Cathy Sutton's damages exceed that limit.

11. Adam Curey and Rick Likes owe nothing to Jeffery G. Shaner for the alleged conversion of his property. They were authorized by Jeffery G. Shaner to remove timber from the real estate.

Appendix at 6 (footnotes omitted). Accordingly, the court entered judgment on the counterclaim in favor of Sutton in the amount of \$6,000.00.

On appeal, Likes and Curey argue the trial court erred by determining that they had committed criminal conversion against Sutton. They claim this conclusion is precluded by the court's express finding that Likes and Curey acted with Shaner's authorization (via a valid and enforceable contract) to harvest timber from the land.

Before reaching the merits, we observe that Sutton has not favored us with an appellate brief. Accordingly, we will not undertake the burden of developing arguments for her. *See Barger v. Barger*, 887 N.E.2d 990 (Ind. Ct. App. 2008). Further, we will apply a less stringent standard of review, and we may reverse the trial court's decision if the appellant can establish prima facie error. *Id.* Prima facie means "at first sight, on first appearance, or on the face of it." *Id.* at 992. Likes and Curey have clearly met this threshold.

Recovery in a civil action for conversion requires the claimant to prove commission of the crime by a preponderance of the evidence. *Breining v. Harkness*, 872 N.E.2d 155 (Ind. Ct. App. 2007), *trans. denied*. To show that Likes and Curey committed the crime of conversion, Sutton was required to establish that they *knowingly or intentionally* exerted unauthorized control over Sutton's property. *See* Ind. Code Ann. § 35-43-4-3 (West, PREMISE through 2008 2nd Regular Sess.). *See also Breining v. Harkness*, 872 N.E.2d 155; *Computers Unlimited, Inc. v. Midwest Data Sys., Inc.*, 657 N.E.2d 165, 171 (Ind. Ct. App. 1995) (“[c]riminal conversion requires the unauthorized control to be either knowing or intentional”).

The trial court did not specifically find, and the facts do not support a finding, that Likes and Curey's alleged unauthorized control over Sutton's property was knowing or intentional. Rather, the facts establish that Sutton's co-owner sought out Likes to inquire about timbering the land. Sutton was aware that these discussions were occurring and that Shaner intended to enter into a contract with Likes. In fact, she reviewed the contract immediately after it was executed. Though she apparently expressed reservations to Shaner about the contract as executed, she never directly contacted Likes. Likes acknowledged that he was aware that the land was co-owned by Shaner and Sutton, but he believed Shaner's authorization to timber the land was sufficient. In fact, the trial court expressly found that “[Likes and Curey] were authorized by Jeffery G. Shaner to remove timber from the real estate.” *Appendix* at 6.

On the face of the record before us, we see nothing criminal about Likes or Curey's

actions. *Cf. Breining v. Harkness*, 872 N.E.2d 155 (control authorized where co-owner of checking account voluntarily transferred funds to defendant). Therefore, we reverse the judgment against Likes and Curey on Sutton's counterclaim for conversion.

Judgment reversed.

MAY, J., and BRADFORD, J., concur